IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No.149-SB of 1996

Date of Decision: August 29, 2007

Sukha Singh

...Appellant

VERSUS

State of Punjab

...Respondent

Criminal Appeal No.236-SB of 1996

Date of Decision: August 29, 2007

Natha

...Appellant

VERSUS

State of Punjab

...Respondent

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Kundan Lal Chaudhri, Advocate,
for Mr.GBS Dhillon, Advocate,
for appellant in Crl.Appeal No.149-SB of 1996.

Mr.Ashish Verma, Advocate,
for appellant in Crl.Appeal No.236-SB of 1996.

Mr.Shailesh Gupta, DAG, Punjab,
for the State.

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RANJIT SINGH, J.

This order will dispose of above-mentioned two criminal appeals as they arise out of the common judgment.

Natha and Sukha Singh have challenged their conviction under Section 376 IPC and the award of sentence of ten years rigorous imprisonment coupled with fine of Rs.2000/- each. They were to undergo six months rigorous imprisonment in case of default of payment of fine.

The allegations of offence under Section 376 IPC are made against the appellants by Sheero (PW-4) daughter of Sarmukh Singh (PW-5) of village Sheron. She alleges that on 20.1.1995 at about 10.00 A.M., she had gone to the shop of appellant Natha to get some house-hold articles. At the shop, appellant Natha told prosecutrix (PW-4) to bring a milk bucket hanging with iron wire with a hook inside the shop. As soon as PW-4 carried the bucket inside, Natha picked her up and took her to a store of the shop. PW-4 alleges that appellant Natha removed her clothes and then raped her. Having done so, appellant Natha went out and the prosecutrix put her clothes on. Meanwhile appellant Sukha Singh entered the store. He also stripped her naked and committed rape upon her. As per PW-4, one Gurmit Singh was seen peeping through the window of the store and had asked appellant Sukha Singh to desist from committing the act, but he (Sukha Singh) told him that he would leave after completing the act. After the incident, prosecutrix had gone to her house and narrated the incident to her parents. Ultimately, the prosecutrix made a statement, Exh.PH, on 28.1.1995, which was recorded by the police. Initially she made allegation of her

molestation by appellant Natha only. On 29.1.1995, she made a supplementary statement, Exh.PJ, where she disclosed the fact of having been raped by Natha. She did not make any complaint against appellant Sukha Singh. Prosecutrix was got medico-legally examined by Dr.Karnail Kaur (PW-2). Natha appellant was also examined by Dr.Jaswant Singh (PW-3), who opined that appellant was fit to perform sexual intercourse. On the basis of Exh.PH (statement of the prosecutrix), formal FIR Exh.PH/2 was recorded under Section 354 IPC. After recording supplementary statement, Exh.PJ, the offence was converted into Section 376 IPC vide report, Exh.PK. The appellants were arrested in due course of time and after completing investigation, they were prosecuted leading to their conviction and the sentence as noticed. That is how they both have filed these two separate appeals before this court, which are being disposed of together, judgment being common.

The prosecution case is supported by the evidence of Sheero (PW-4), her father Sarmukh Singh (PW-5) and that of the three doctors and the Investigating Officer. Surta Singh and Gurmit Singh were given up having been won over by the appellants. Bharat Bhushan ASI and Amarjit Singh Inspector, however, were given up being un-necessary.

The appellants when confronted with the incriminating evidence and circumstances appearing against them, pleaded false implication. Appellant Natha stated that he ran a karyana shop in the village and Sarmukh Singh, father of the prosecutrix, used to take articles from him for which he had to pay his dues. Natha claims to have demanded the said dues when Sarmukh Singh put him off. He

had then reported the matter to the police, which led to Sarmukh Singh being called by the police. They also gave beatings to him. It is stated that due to this grudge, this false case under Section 354 IPC was got registered against Natha by the complainant party. He denied the allegation of rape being absolutely incorrect and pleaded that he was innocent. Appellant Sukha Singh also denied the allegation of having committed rape on Sheero and pleaded that case was planted on him due to party-faction.

I have heard the counsel for the parties.

The counsel for the appellants submit that the prosecution case rests on solitary account given by prosecutrix (PW-4), whose evidence suffers from serious infirmity and as such it would not be safe to convict the appellants, when there is no assurance forthcoming to the story given by her. The State counsel, on the other hand, would say that prosecutrix had given a clear account of the offence committed by both the appellants and, as such, she can be believed without looking for corroboration to her version as per the settled position of law to the effect that conviction can be based on the sole testimony of a prosecutrix in such cases.

There is not much dispute that the case of the prosecution would mainly rests upon the evidence of the prosecutrix and the same may require minute scrutiny to see if it would be safe to maintain conviction of the appellants on the basis of account given by her alone. The contention made on behalf of the appellants appears to be that it is a case of their false implication because of the reasons as already disclosed and even if somehow it is revealed that something had transpired between the appellants and the

prosecutrix, then it was a case of intercourse with consent and not of rape, as alleged. The question in regard to the age of the prosecutrix would also then assume relevance to see if she was capable of giving a valid consent, if otherwise sexual intercourse is proved.

While appearing as PW-4, the prosecutrix narrated the manner in which she was subjected to rape by both the appellants. At the time of making statement, she gave her age to be 12-1/2 years. Without mentioning about the date of incident, PW-4 deposed that about 11 or 12 months back, at about 10.00 A.M. she had gone to the shop of Natha appellant to get some house-hold articles. She then gave out the details as to how she was made to enter the shop and taken inside the store. PW-4 further brought out “he took off my clothes from my body and committed rape on me against my consent”. As per PW-4, appellant Natha had gone out after committing rape and she had put on her clothes. Appellant Sukha Singh had reached in the meantime. As per the allegations, he also stripped PW-4 naked and then committed rape on her. Her version further is that at the time one Gurmit Singh was seen peeping through the window of the store, who asked Sukha Singh to desist from doing act, but Sukha Singh replied that he would come out after completing the act. Thereafter PW-4 had gone to her house after wearing her clothes. She claims to have narrated this incident to her parents and then on 28.1.1995, her statement was recorded by the police, which is Exh.PH. In her examination-in-chief only, PW-4 stated that in her previous statement she had not mentioned the fact that appellants had committed rape on her which, she says was, due to fear. Her version, in this regard, is as under:-

> “In my statement as Ex.PH, I had not got recorded that the accused had committed rape on me, as out of fear, I had not narrated this incident to my parents. Out of fear, I had also not told this incident to the police.”

As already noticed, her supplementary statement was recorded on 29.1.1995, wherein the fact of rape was disclosed by her. To lend corroboration to her version, the prosecution would refer to the statement of her father Sarmukh Singh (PW-5). He gives the date of the incident to be 20.1.1995. As per PW-5, his daughter, PW-4, had gone to take house-hold articles from the shop of Natha and when she came back, she was in tears. As per PW-5, his daughter had told him that appellant Natha had insulted her. PW-5 had then gone to the house of appellant Natha. He further claims that Natha had sent police to his house in the evening and got him hauled up, whereupon he was given beating also. PW-5 thereafter disclosed that his daughter Sheero told him that Natha and Sukha Singh accused had committed rape upon her and statement of prosecutrix Sheero was accordingly recorded by the police leading to registration of the case. He gave the age of his daughter to be 16 years. From the account given by PW-5, it is clear that he has deposed whatever was conveyed to him by his daughter and thus is not an eye-witness to the incident. Thus, in fact prosecution mainly would depend upon the testimony of PW-4 to seek conviction of the appellants. The evidence of PW-5 would be more of corroborative in nature. It would emerge from the evidence of PW-4 and PW-5, that this incident took place on 20.1.1995. The prosecutrix, though complains of being subjected to rape, but did not disclose so initially even to her parents.

The testimony of PW-5 would show that PW-4 had complained to her father only about her being insulted by appellant Natha. In this regard, PW-5 said “she told me that Natha accused had insulted her”. His further version again makes a strange reading. PW-5 says that he alone had gone to the house of Natha after this and then mentions that Natha had sent police in the evening to his house and got him hauled up. He also complains of being beaten by the police. May sound strange but he has not disclosed any reason why appellant Natha had called police and for what reasons he was taken to police station. Even this version given by PW-5 was seriously dented during his cross-examination. PW-5 had to concede that he is a daily wager and used to go for loading chaff and as such usually returned late at night around 8.00 or 9.00 P.M. In this context, he had to concede that on the day of incident, his daughter Sheero had gone to sleep when he returned home. How could then PW-4 complain to her father and how thereafter, PW-5 could have gone to Natha's shop leading to police being called etc. Faced with this situation, PW-5 changed track and said that his wife told him on the following day that Natha had outraged the modesty of Sheero. His earlier version thus came under doubt. Otherwise, PW-5 conceded that his family used to purchase house-hold articles from the shop of Natha appellant. His version coming on record through his cross-examination shows that he was beaten up by the police in his house only and was not taken to the police station. PW-5 further stated that a panchayat was gathered. When suggested, he denied that he had admitted that he owed some dues to appellant Natha before Panchayat and that he had agreed to pay the same. During his

cross-examination only, PW-5 agreed that his daughter Sheero disclosed to him that she was subjected to rape on 20.1.1995. He further conceded that his whole family members had come to know about the incident of rape on 21.1.1995. PW-5 also claims to have disclosed this fact to Swaran Singh member panchayat on 21.1.1995 itself. Still PW-5 did not complain about this incident to anyone or otherwise told this to any one else in the village. His (PW-5) version is that he had gone to the police station on 21.1.1995, but had not told the police that the appellants had molested or outraged the modesty of his daughter. It would cast yet another doubt on the prosecution case. In this regard, he was confronted with the portion of his previous statement where it was found so recorded. While being cross-examined by the counsel of appellant Sukha Singh, PW-5 again claimed that he was present at his house on 20.1.1995, which is contrary to what he stated during his cross-examination earlier. PW-5 has now stated that he had gone to search for his daughter when she had not returned for sometime and had met her enroute. The shop was at a distance of 2-1/2 killas from his house. PW-5 claims that the incident of rape was narrated to him by his daughter on reaching the house, but still he did not go either to the police station or to the Sarpanch or Panchayat. He says that he had gone to the police station on the next day, where he gave his statement which he even thumb marked. The witness again changed this version and saisd that SI had not noted down his statement. Further, he mentioned that his daughter had also gone to the police station and made a statement. He admitted the suggestion that he was made to sit at the police station for whole day on the day

following the incident of rape. He was also confronted with the portion of his statement where he had stated that he found Surta Singh present at the shop when he had gone looking for his daughter, which he denied while under cross-examination. In short, he is found contradicting himself on different aspects even before the court. Sometimes this witness is saying that he was present and had gone to look for his daughter, whereas he also concedes that he was not present in his house on the day of incident and came late.

Concededly PW-5 learnt about the allegations of rape of his daughter on 21.1.1995. It is noticed that still no report was lodged either with the panchayat or the police. Statement for the first time is made by PW-4 before the police on 28.1.1995 after eight days of the incident. Strangely, in this statement, no allegation of rape is made by the prosecutrix. She only accuses one appellant of molestation. The explanation given by the prosecutrix that she did not disclose about rape out of fear, cannot be accepted and also is not in tune with the version given by her father. PW-4 says that she did not disclose this fact to her parents out of fear, whereas PW-5 says contrary to the same and has clearly stated that the prosecutrix had informed him on 21.1.1995 of being subjected to rape. The same explanation is given by PW-4 not to disclose the allegations of rape on 28.1.1995, whereas prosecution evidence would show that she had already disclosed the same to her father on 21.1.1995. If she had already told her father about rape, what fear she would carry not to disclose the same before the police on 28.1.1995, after seven days of having shared this information with her father. She would also perhaps not have any explanation to offer as to why then she

disclosed the factum of rape on 29.1.1995, i.e., the following day of her having made a statement of molestation before the police. It is also noticeable that in the statement made on 28.1.1995 or 29.1.1995, she has not named appellant Sukha Singh at all. Thus, the delay on the part of prosecutrix and her parents to lodge report really has no explanation. While under cross-examination, PW-4 concedes that she had wrongly recorded in Exh.PH that appellant Natha had teased and molested her. It is also seen that the door of the shop opens in a street, which is regularly frequented by people. Record also reveals that there are many houses on either side of the shop. PW-4 states that she had been visiting the shop for a past 5-6 years for getting house-hold articles. The perusal of Exh.PH, the first statement made by PW-4 before the police, would also show that she has mentioned about the presence of Surta Singh, member panchayat, therein, while she was held from arms by appellant Natha. If that be a fact, how could appellants have taken the prosecutrix inside the store to commit rape. Perhaps it would not find any easy answer.

The cross-examination of PW-4 would further disclose certain unconvincing facts. PW-4 says that appellant Natha, after putting off her clothes, had hanged these on the pegs installed in the store. As per her, appellant Natha took one hour to commit rape. She could not tell if the door of the store was bolted or was kept unbolted. When further questioned, she stated that appellant Natha first removed her salwar and then shirt. A cot was statedly lying spread there on which appellant had placed a bed sheet after he had removed the clothes from the body of PW-4. PW-4 concedes that she

did not ask appellant Natha to spare her or to leave her. She has deposed that she was made to lie on the cut and appellant Natha got on to her. As per the evidence, appellant Natha had raped PW-4 only once. No one was present when this incident took place. Appellant Sukha Singh is claimed to have seen Natha committing rape of PW-4. As per PW-4, she or her father had not gone to report the incident to panchayat or police. Another fact of significance seems to have come on record during unguarded moments when she states that they had approached the police about quarrel between her family and Natha appellant after about one or two days of the incident of rape. Her version in this regard is “we had approached the police when the quarrel had taken place between us and Natha Singh accused after about one or two days of the incident of rape”. The record shows that she told the police about her molesting only and that she had not mentioned the name of appellant Sukha Singh. Her cross-examination would also show that she is aware that a case of outraging the modesty alone was registered and Natha appellant was released on bail. PW-4 has mentioned that appellant Natha did not stop from abusing them when they convened panchayat. She further concedes that the panchayat had decided that the dues of the house-hold articles will be paid to Natha. Having said so, she immediately made amends and tried to resile from this version as can be seen from the following portion of her testimony:-

> “It was decided in the panchayat that the dues of the house-hold articles will be paid to Natha Singh. Again said, I do not remember as to what decision was taken by the panchayat. Natha Singh was held guilty by the

panchayat."

It can, thus, be seen that the prosecutrix is seen to be making material improvement and is also found contradicting her version on various aspects. Her version seems to be further dented during the cross-examination conducted by the counsel of appellant Sukha Singh. Here strangely she had introduced another fact that her statement was recorded by the police for the first time after three days of the incident of rape at Police Station, Tarn Taran at 5.00 P.M. As per PW-4, her father and co-villagers were also present with her at that time. When she stated so, the Addl.Public Prosecutor made a statement that there is no such statement of this witness recorded at Police Station, Tarn Taran. She was further confronted with various portions of her statement made in Exh.PH, when she had to concede that she did not state that Natha appellant had picked her up and took her to the store of the shop. PW-4 further agreed that in police statement, Exh.PH, she did not state that Natha had put off her clothes from her persons and he committed rape on her against her consent. She also concedes that she did not state in her statement, Exh.PH, that she put on her clothes in the meantime and appellant Sukha Singh came in the store and committed rape on her after stripping her clothes off. She also agreed that she had not got recorded in statement, Exh.PH that Gurmit Singh had been peeping through the window of the store and had asked Sukha Singh to desist from doing this act and that appellant Sukha Singh had replied that he would come out after committing rape. Thus, the major portion of her statement, which is now made before the court, is found missing from the first statement given by PW-4, i.e., Exh.PH. This

infirmity cannot be easily ignored. This is also required to be appreciated in the background that incident was eight days old when this statement was made by her. During some unguarded moments, PW-4 also conceded the fact that panchayat had been held in regard to the dues of house-hold articles, which were to be paid to appellant Natha. Though she made an immediate attempt to resile from this version, but this fact had come in evidence on record. This would also explain the reasons and background for which perhaps Natha had gone to the police station to complain against PW-5, father of PW-4. This would also read in line with the fact that PW-5 was either taken to police station or was questioned by the police in this regard. Thus, the defence as projected by appellant Natha seems to be getting support from the version of the star prosecution witnesses, i.e., PW-4 and PW-5. Appellant Natha has set up a defence that PW-5 owed him money for having bought house-hold articles about which he had complained to the police leading to his being called and because of this, the present complaint was lodged against him initially for molestation followed by the allegation of rape. Defence would accordingly plead that the evidence given by PW-4 and PW-5 is required to be appreciated in this background.

PW-4 claims to have disclosed the allegation of rape to her father on the very next day of the incident. Still the family has not taken any action to lodge a complaint against the appellants. Ultimately, they had gone and complained to the police after eight days of the incident. Still PW-4 would not make any allegation of rape and would only complain of molestation. The explanation of being under fear would sound puerile as she had already disclosed this fact

to her father on 21.1.1995. If she was under fear, then father could easily disclose this fact to the police as he had accompanied her to police station on 28.1.1995. In fact, the evidence of PW-4 and PW-5 even is contrary in this regard. The father says that his daughter had disclosed the allegation of rape to him on 21.1.1995, whereas daughter (PW-4), during her examination-in-chief, would say that she did not disclose this fact to her father or the police out of fear. Who is telling truth and who is hiding, as such, is required to be explained by the prosecution. In any case, this conflicting versions would certainly cast doubt on the prosecution story, specially so when the allegations of rape are made for the first time after nine days of the incident and that too against one of the appellant. It is in this context that one would be required to see if it is safe to base a conviction for the offence of rape on the sole testimony of PW-4. Her version does not seem to be inspiring that confidence to convict two appellants for the offence of rape. She keeps quiet for nine days and does not complain of the allegation of rape even to the police and did so by changing her version given initially. This all is to be again appreciated in the background that both the star prosecution witnesses appear to be conceding about the dues that they owed to appellant Natha for which they were summoned to the police station and panchayats were held asking them to clear these dues. It is thereafter they seem to have decided to make this allegation against the appellants. In fact, PW-4 has conceded in no uncertain terms that they had approached the police after the quarrel had taken place between them and appellant Natha after about one or two days of the incident of rape. This portion of her evidence has been quoted

above. PW-4 seems to have further contradicted herself from the previous statement made by her. She concedes that she did not name Sukha Singh appellant in Exh.PH. When questioned, she agreed that she did not meet Surta Singh member panchayat and that he had not come to the shop of Natha on the day of incident. She had also statedly not seen him on the said date. Her attention was then drawn to Exh.PH wherein it was recorded through her that Surta Singh had come to the shop of Natha appellant on the day of the incident. Though may sound strange, but PW-4 has disclosed yet another version while under cross-examination by the counsel for appellant Sukha Singh. When questioned about Gurmit Singh, PW-4 stated that she had seen him for the first time when the people had assembled there after the occurrence. When further questioned, PW-4 stated that she could not tell the names of those persons, who were talking about the name of Gurmit Singh, from which she had learnt about him. She further volunteered to disclose that 200-400 co-villagers had gathered there. She went on to say that she had disclosed to all of them about the incident of rape and that these persons had nabbed appellants Natha and Sukha Singh and took them to the police station where they all had stayed till evening. As per PW-4, her father had reached the police station in the evening and took her away. As per her version, she was again called to the police station on the next day when she did not see both the appellants there. On that day also, she was made to remain present in the police station whole day. She denied the suggestion of the defence that she was deposing falsely and that no such occurrence had taken place.

If what PW-4 has disclosed as noted above, then why she did not make any complaint of rape on the day of incident, when she had disclosed this fact to a crowd of 200-400. There is no evidence in this regard led by the prosecution that any crowd had so gathered. Her father, PW-5, does not say anything on this aspect. He rather seems to be either away or was present at his house. He does not say if he had gone to the police station in this regard. He rather tells entirely different story about he being taken to the police station. The Investigating Officer does not support this aspect of the version brought on record by PW-4. Rather Investigating Officer Baldev Singh has disclosed that he learnt about the incident of rape for the first time when statement of PW-4 was recorded on 29.1.1995. He rather concedes that on 20.1.1995 or 21.1.1995, he had not made prosecutrix or her father to sit in the police station. In this regarding, Investigating Officer (PW-8) said that they had made a false statement. Delay in lodging complaint in a criminal trial would generally be fatal unless it is plausibly explained. Delay is viewed with concern as it can afford opportunity to a party to deliberate and come out with version which may be an embellished one or even a fabrication. Report gets bereft of the advantage of spontaneity if it is delayed. Danger also creeps in of being a coloured version. Delay in reporting to the police or courts thus would make the court to view the allegation with suspicion. Delay without explanation is treated fatal. Reference can be made to ***Thulia Kali v. The State of Tamil Nadu, AIR 1973 SC 501 and Ram Jaga and others v. The State of U.P., AIR 1974 SC 606*** on aspect of delay. The version of prosecutrix (PW-4) even would not seek any support from any

evidence on record. It would, thus, may not be safe to rely upon what she is stating. She seems to be giving different version at different stages of the case.

Her version ofcourse would also not find support from the medical evidence, another relevant factor required to be taken into consideration. She was examined by Dr.Karnail Kaur (PW-2). Though this examination was conducted on 30.1.1995, but PW-2 did not notice any abnormality or injury on any part of the body of PW-4. Hymen though was completely torn but shown no mark of any fresh injury. In fact PW-4 was subjected to examination for confirmation of her age as well. Having referred PW-4 for X-ray examination, PW-2 gave her age between 15-17 years. PW-2 further opined that possibility of prosecutrix being habitual of sexual intercourse cannot be ruled out. Thus, the evidence of recent sexual intercourse is not forthcoming from the medical evidence. Rather the evidence given by PW-2 will cast a dent to the version of PW-4. PW-2 stated that "patient gave the history of being caught by four persons. She did not give the history of sexual intercourse but a struggle only". Again PW-4 seems to be changing her stance. She did not complain about rape from 20.1.1995 to 28.1.1995. She makes a statement of molestation only on 28.1.1995, which she changes to rape on 29.1.1995. While appearing before the doctor on 30.1.1995, she again changes it to struggle and does not complain of sexual intercourse. The prosecution would not be in a position to explain this changing stance of the prosecutrix. Dr.Inderjit Singh (PW-1) also gave the age of prosecutrix to be between 15-17 years by making reference to the detailed data given in his report, Exh.PB. The detailed reference to

the evidence of the prosecution, specially that of the prosecutrix, her changing stance and the same being not receiving any corroboration from any evidence or material on record, would render it rather unsafe to place much reliance on her testimony.

I am being conscious of the fact that conviction can be based on the sole testimony of the prosecutrix unless there are compelling reasons to look for corroboration. She is not to be treated as an accomplice. However, if conviction is to be based on the solitary account of prosecutrix alone, then the court is to satisfy itself that her testimony inspires confidence and is found reliable. The wavering stand taken by the prosecutrix, her conduct in not disclosing the offence of rape initially and not lodging any report with the police till about ten days after the incident, coupled with the fact that even while doing so, she did not complain of the main offence of rape would make it unsafe to base conviction on her account alone. She did not disclose this fact before a doctor at the time of medical examination, a day after making the allegations of rape. She did not name one of the appellants in the statement made before the police even of he having molested her.

In her version before the court, she introduced the name of Gurmit Singh, who was seen peeping through the window when she was subjected to rape. In fact, Gurmit Singh would have been the best witness to support prosecution case. He was given up having been won over. Similarly Surta Singh was not examined, though he was named in the first statement made by the prosecutrix. Thus, there is no support from anywhere to the version narrated by the prosecutrix. The evidence of her father (PW-5) also seems to be

at different wavelength from that of the prosecutrix. They also seem to be saying something contradictory or contrary to each other on some significant aspects. To my mind, it would be unsafe to sustain conviction of the appellants.

The possibility of it being an intercourse with consent, may emerge if one was to say that indeed PW-4 was subjected to intercourse. The detailed manner in which she has narrated the incident when appellant Natha removed her clothes, hanged the same on peg, spread the bed sheet on a cot and then subjected her to sexual intercourse by making her to take different poses as disclosed by PW-4 would give sufficient indication of it being a case of consent. She could have easily raised her voice, if she was not a consenting party. The incident is at a shop, which is not an isolated place, but is in a street, which is frequented by various persons. The shop is located within the vicinity of houses and a simple shout could have attracted people to the scene. Nothing of sort seems to have happened. If PW-4 is to be believed, then she had put on the clothes after being subjected to intercourse by appellant Natha. Sukha Singh thereafter reached and stripped her naked and subjected her to intercourse. They were seen, as conceded by her, by Gurmit Singh, who objected, but still they carried on. Gurmit Singh has not been examined. Could any person have continued with this sexual exploits even on being detected by a stranger like Gurmit Singh?. Normally this can not be expected. Why she did not complain of all this immediately and choose to remain silent for about nine days of the incident. She has not disclosed these facts when there is evidence of panchayat having been assembled to determine the

dues of appellant Natha, which they were required to clear. This may, thus, appear to be a case of consent.

The prosecution still could have succeeded in assuring the conviction of the appellants, if they were able to establish the age of the prosecutrix with some assurance. Though the prosecutrix claims that she is 12-1/2 years of age, but her father gave her age to be 16 years. The medical evidence showed her age to be 15-17 years. In the state of this evidence, it cannot be said with assurance that she was less than 16 years of age. Even her father does not say that she is less than 16 years. PW-5 was further caught in this regard when he conceded that he was married 35 years back and prosecutrix was a third child. He immediately changed his version to say that his marriage was 22 years back. How he could say in one breath that he was married 35 years back and then change it to 22 years? It would clearly indicate that he is not a truthful witness. Having disclosed age of his marriage, he seems to have realised the consequences thereof to make amends to say that it was 22 years old. There cannot be any co-relation with word “Thirty five (`Pantee') and Twenty two (`Baaees') to say that this was due to any slip of tongue. Words thirty five and twenty two would not be such a sound which could occur due to any slip of tongue. He said so only to show the age of the prosecutrix to be less than 16 years or around 16 years. Otherwise, the evidence shows that prosecutrix is third child. The first child, as per evidence, was born after three years of the marriage and the next was after five years followed by third child was after two years of the birth of the second child. If the age is calculated by taking the marriage to be 35 years old, it will make

prosecutrix to be 25 years old. If marriage is considered to be 22 years old, then the prosecutrix would be 12 years of age at the time of deposition, which in fact is not even the evidence given by PW-5, father of the prosecutrix. This when read in the light of the medical evidence revealing the age of the prosecutrix to be between 15-17 years, would be enough to say that prosecution did not succeed in showing that the prosecutrix was aged less than 16 years.

The counsel appearing for the appellants are justified in saying that if there is any doubt in regard to the age or on any aspect of the case, that needs to be resolved in favour of the defence, rather than giving any benefit of the same to the prosecution.

Taking the totality of the evidence led in this case in regard to the age of prosecutrix, it can be said that the prosecution was unable to show that the prosecutrix was less than 16 years of age and thus even if it be a case of consented intercourse, then also it would take the appellant out of the purview of offence of rape, consent being valid. This question, to my mind, appears to be of not much consequence as appreciation and analysis of the prosecution evidence would show that prosecution did not succeed in establishing the allegation of rape with sufficient assurance to the satisfaction of judicial conscious of the court. Varying and contradicting versions of the prosecution and lack of cogent corroborative evidence would go to cast a doubt on the entire story of the prosecution as projected, benefit of which must accrue to the appellants.

Giving benefit of doubt arising from the prosecution case,

as projected, it is held that prosecution has failed to prove the case against the appellants beyond a shadow of reasonable doubt their conviction, as such, cannot be sustained. Both the appeals are allowed. The conviction and the sentence awarded to the appellants are set-aside. The appellants are acquitted of the charge levelled against them. Their bail bonds and surety bonds stand discharged.

August 29, 2007 (RANJIT SINGH)
ramesh JUDGE